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In the Supreme Court of the United States

OCTOBER TERM, 1979

LAWRENCE KRASNY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 607 F. 2d 840.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1979. A petition for rehearing was denied on November 20, 1979 (Pet. App. 17). The petition for a writ of certiorari was filed on December 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner is entitled to a new trial on the basis of newly discovered evidence that a government witness may have given perjurious testimony.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of conspiracy to import heroin and conspiracy to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846 and 963. He was given concurrent sentences of five years' imprisonment on each count. The court of appeals affirmed.

During the pendency of the appeal from his conviction, petitioner moved for a new trial under Fed. R. Crim. P. 33 on the ground of newly discovered evidence that a government witness may have given perjurious testimony. The district court denied his motion, but the court of appeals vacated that judgment and remanded for further proceedings to determine whether perjury was in fact committed and, if so, the effect of that testimony on petitioner's conviction (Pet. App. 1-16).[1]

1. The evidence at trial showed that petitioner conspired with co-defendant Gary Bennett and unindicted co-conspirator Gloria Worley to import heroin from Thailand and to possess heroin with intent to distribute it. Worley testified that petitioner asked her to go to Bangkok, Thailand, and bring back some "stuff," which she thought would be cocaine (Tr. 66-67).[2] Petitioner paid part of the cost of her airline ticket from Los Angeles to Bangkok and purchased the ticket for her return flight from Bangkok to Honolulu, Hawaii (Tr. 68). He also told her where to stay in Bangkok, and he instructed her to get

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[1]The court of appeals also recalled the judgment affirming petitioner's conviction and stayed its issuance pending disposition of the instant appeal (Pet. App. 19).

[2]"Tr." refers to the transcript of petitioner's trial.

the "stuff" through Customs by concealing it in her body (*ibid.*). In Bangkok, Worley met with Bennett (Tr. 70). Thereafter, a Thai male gave Worley two condoms containing a white powder, which she then took to Honolulu. Upon her arrival, she was searched by Customs officials, who discovered approximately two ounces of heroin on her person (Tr. 75).

After her arrest, Worley consented to the recording of conversations between her and petitioner, and the government introduced those tapes at petitioner's trial. In the course of her conversations with petitioner, Worley pretended to have the narcotics in her possession and to be seeking a means of returning from Honolulu to Los Angeles. During the first conversation, petitioner stated that he had waited in Honolulu for her to arrive from Bangkok, and that he was a "nervous wreck" when she was not on the scheduled flight (Tr. 110, 111, 113). He said he had returned to Los Angeles (Tr. 110) and was so worried that he had hired an attorney for her (Tr. 112-113). He asked if she had the narcotics with her, and, when she replied that she did, he said he would have to fly to Honolulu and dispose of the drugs while she was there (Tr. 110). He then said that he thought he would send "Jay" to Honolulu instead (Tr. 111) and that he would see if "Jay" could leave that night (Tr. 113). He also said he could tell her how to sell the narcotics in Honolulu so that she could return with the proceeds (Tr. 112). However, when she objected, he told her to bring the narcotics to Los Angeles, saying "I've got it sold" (Tr. 113).

In the next recorded conversation, petitioner told Worley that he could not come to Honolulu and that it would be quicker for her to return to Los Angeles and let him "take care of business" (Tr. 120). He informed her that she could not be paid her expenses and courier's fee

until he had obtained and sold the narcotics (Tr. 122), but that he had people eager to get the drugs and that she would have her money within two days (Tr. 123). In a third recorded conversation, initiated by petitioner, he tried to persuade Worley to give a sample of the drugs to some of "Paul's" men as a means of selling the drugs to "Paul" (Tr. 126, 132-133). Worley refused, saying that the procedure was too complicated (Tr. 133) and that she did not want to "wheel and deal" (Tr. 127).

Petitioner took the stand in his own defense. According to his testimony, petitioner had gone to Honolulu on real estate business, and he had tried to assist Worley only under duress. He said that prior to leaving for Honolulu he had received a call from Bennett, who stated that he was sending Worley to Honolulu with some "stuff" for Paul Tichenal. Petitioner testified that Bennett had told him that Worley was distraught and had asked him to meet her and to try to calm her down. Petitioner stated that when he arrived in Honolulu he called Bennett and refused to take part in the transaction. According to petitioner, he then called Jay Hathcock in Los Angeles at Bennett's request; Hathcock threatened him and his family if he did not meet Worley. After returning to Los Angeles, petitioner said he called Hathcock to say that he had not met Worley because she was not on the designated flight. Hathcock then ordered him, under threat of death to him and his family, to contact Worley by telephone and to make sure that she "took care of business." Petitioner also testified that in subsequent conversations Hathcock gave him instructions to relay to Worley. This background, petitioner asserted, provided the context for his telephone conversations with Worley (Tr. 305-314). Petitioner denied having had any prior criminal involvement with Bennett, Worley or Hathcock (Tr. 345).

2. On cross-examination, Worley acknowledged that she had previously accompanied Bennett to Tijuana, Mexico, on two trips he made to obtain narcotics. While she admitted that she knew the purpose of the trips, she denied taking any part in the transactions (Tr. 148, 153-156). She also testified that Bennett had instructed her to obtain a passport because he intended to take her on a trip to the Orient, and that Bennett had told her to open an account in a bank having offices in Bangkok (Tr. 147-148). She stated that she understood Bennett to be in the narcotics business both in Mexico and in the Orient (Tr. 153, 156).

After trial, the prosecutor advised petitioner's counsel of certain information, unknown to the government at trial, concerning Worley's testimony about her prior involvement with Bennett in narcotics transactions. Based on that information, petitioner filed a motion for a new trial under Fed. R. Crim. P. 33 on the ground of newly discovered evidence that Worley's cross-examination testimony had been perjurious. In response to petitioner's motion, the government submitted an affidavit from Worley that stated the following: (1) a few months prior to the transactions involved in this case, she had been with petitioner, Bennett, and "Jay" when Bennett mentioned the opportunity to make money by selling Quaalude pills to people he knew who wanted them, and she had laughed and told Bennett he was crazy when he asked if a pharmacist could be obtained as a source; (2) she had seen Bennett using cocaine and marijuana and, when he asked how she felt about using drugs, she told him she did not use them; (3) she had acted as an interpreter on a trip petitioner and Bennett had made to Tijuana, Mexico, to obtain pills and marijuana, and she had returned to Tijuana with Bennett the next day and

again acted as an interpreter when he attempted to purchase drugs; (4) on another occasion, she was present with Bennett and petitioner when Bennett said that he was trying to get a good source for drugs and that he had people waiting; she subsequently went to Tijuana to pick up Bennett after being unable, as Bennett had requested, to find petitioner to do so, and on the return trip Bennett said he had some cocaine; (5) she had heard Bennett talking about drugs three or four times, and on one occasion, after she said that it was getting to be "too much," he assured her that she did not have to be afraid of going to jail since he had friends who would help her if she were caught; (6) on one occasion she had mailed packages for Bennett that she suspected contained drugs, and Bennett later verified that they contained cocaine; (7) she called the "Old Man" for Bennett at the latter's request when Bennett was broke and wanted money from the "Old Man"; and (8) prior to the transactions in this case, she, petitioner, and "Jay" met Bennett in a hotel upon Bennett's return from the Orient (R. 119-120).[3]

3. Petitioner's motion for a new trial was premised on the asserted inconsistency between the post-trial information ultimately contained in Worley's affidavit and her trial testimony, in which she minimized her involvement in Bennett's drug-related activities. The district court denied the motion for a new trial. The court did not decide whether Worley had perjured herself at trial, but it concluded that "the suggested new evidence is at best cumulative and would not be of sufficient import to alter the jury's determination in this matter in terms of guilt or innocence" (Pet. App. 3-4).

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[3]"R." refers to the record in the court of appeals.

The court of appeals vacated the denial of the new-trial motion and remanded the case to the district court. In its opinion, the court of appeals followed *United States* v. *Stofsky*, 527 F. 2d 237 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976), and held that the test for a new trial on the ground of newly discovered evidence concerning perjury by a government witness is whether the new evidence would "probably" produce an acquittal. The court rejected the test first stated in *Larrison* v. *United States*, 24 F. 2d 82 (7th Cir. 1928), under which newly discovered evidence of perjury by a government witness is deemed sufficient to require a new trial if there is a "possibility" that the evidence would result in an acquittal. Because it found the district court's factual findings to be inadequate, however, the court of appeals vacated the district court's judgment and remanded the case for further findings on the issues raised in petitioner's motion for a new trial. Among the findings that the district court was directed to make were whether Worley had committed perjury and, if so, the importance of her testimony to the government's case, the extent to which her perjured testimony concerned material issues in the case, and the impact on her credibility of revealing such perjury to the jury (Pet. App. 12-13). This remand is presently pending in the district court.

ARGUMENT

Petitioner argues that there is a conflict in the circuits concerning the proper standard for granting a new trial based on newly discovered evidence that a government witness gave perjurious testimony. In particular, petitioner contends that the generally prevailing rule is that of *Larrison* v. *United States*, 24 F. 2d 82 (7th Cir. 1928), which requires, *inter alia*, only that the newly discovered evidence "might" or "possibly would" lead to

an acquittal, and that the court below and the Second Circuit in *United States* v. *Stofsky*, 527 F. 2d 237 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976), have adopted an inconsistent test that restricts new trials to cases where the newly discovered evidence "probably" would produce an acquittal.[4]

At least in its current posture, however, this case does not present an appropriate occasion for the Court to consider the issue. The court of appeals has remanded the case to the district court to determine whether Worley's testimony was in fact perjurious[5] and, if so, "the importance of Worley's testimony to the government's case, the extent to which the apparently perjured testimony concerned material issues in the case, and the extent to which her credibility, as a whole, would be affected by the revelation to the jury of this apparent perjury" (Pet. App. 12).[6] Whether the "possibility" or the

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[4]We note that *Larrison* itself presented "a situation where a principal prosecution witness had made an affidavit (later repudiated) that he had given false testimony *at the instance of Post Office inspectors.*" *United States* v. *DeSapio*, 435 F. 2d 272, 286 n.14 (2d Cir. 1970) (emphasis in original), cert. denied, 402 U.S. 999 (1971). See also *United States* v. *Agurs*, 427 U.S. 97, 111 (1976).

[5]Petitioner acknowledges (Pet. 12) that "the district court made no finding on this crucial issue [of Worley's perjury]." See also Pet. 33-34. Contrary to petitioner's assertion (Pet. 34 n.10), however, it is *not* undisputed that Worley committed perjury during cross-examination, and the district court could reasonably conclude that Worley's testimony was not perjurious in light of her post-trial affidavit.

[6]In light of its remand, the court of appeals did not decide whether Worley's allegedly perjurious testimony on cross-examination was material to the legal issues at petitioner's trial or was, as the district court found, merely cumulative (Pet. App. 11 n.5). This Court likewise need not consider that issue at this juncture, and therefore we only note our disagreement with petitioner's repeated characterization of materiality.

"probability" standard is applied, these determinations must in any event be made. See *Stofsky*, *supra*, 527 F. 2d at 243-247; *Larrison*, *supra*, 24 F. 2d at 87. If the district court finds that no perjury occurred, it will be unnecessary in this case to resolve the question presented by petitioner. See *United States* v. *Johnson*, 327 U.S. 106, 111 n.5 (1946). Likewise, even if perjured testimony had been given, the court may conclude either that petitioner satisfied the higher "probability" standard or that he failed to satisfy the lesser "possibility" standard, in which event it would again be unnecessary to address the legal issue he raises here. And if petitioner remains dissatisfied following remand and appellate review thereof, he can at that point seek review by this Court on the basis of a fully developed record.

Thus, in the absence of findings regarding the perjurious nature of Worley's testimony and the effect of that testimony on petitioner's conviction, petitioner is simply "asking for an advisory opinion on an abstract or hypothetical question." *Benton* v. *Maryland*, 395 U.S. 784, 788 (1969). "[The Court does] not sit, however, 'to decide abstract, hypothetical or contingent questions * * *.'" *Thorpe* v. *Housing Authority*, 393 U.S. 268, 284 (1969), quoting *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945). Since this case lacks "that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult * * * questions," *United States* v. *Nixon*, 418 U.S. 683, 697 (1974), quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962), it is an inappropriate vehicle for the Court to decide the issue raised by petitioner.

We also believe that any differences between the *Larrison* "possibility" standard and the *Stofsky* "probability" standard are largely semantic rather than

substantive. In those cases that cite approvingly to *Larrison* and order a new trial, the testimony in question was so significant that a new trial would have been warranted under either the *Larrison* or the *Stofsky* standard. See *United States* v. *Wallace*, 528 F. 2d 863 (4th Cir. 1976); *United States* v. *Meyers*, 484 F. 2d 113, 116-117 (3d Cir. 1973). By the same token, most of the cases that rely on *Larrison* ultimately deny a new trial even under the "possibility" standard. See, *e.g.*, *United States* v. *Runge*, 593 F. 2d 66, 74 (8th Cir.), cert. denied, No. 78-6855 (Oct. 1, 1979); *United States* v. *Jackson*, 579 F. 2d 553, 557 (10th Cir.), cert. denied, 439 U.S. 981 (1978); *United States* v. *Mackin*, 561 F. 2d 958, 961 (D.C. Cir.), cert. denied, 434 U.S. 959 (1977); see also *Stofsky*, *supra*, 527 F. 2d at 245 & n.9, 246 & n.10, and cases cited therein. The failure of the *Larrison* and *Stofsky* tests to affect the outcome of these cases strongly suggests that the asserted conflict in the circuits is more apparent than real and that the issue of the proper formulation of the standard is not of sufficient importance to warrant review by the Court.[7]

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[7]Petitioner contends (Pet. 24-25, 31-34) that the *Stofsky* standard is foreclosed by this Court's decision in *Mesarosh* v. *United States*, 352 U.S. 1 (1956). However, the perjurious witness in *Mesarosh* was a longstanding informant who testified in his capacity as a paid government agent (352 U.S. at 10). In contrast, there is no suggestion in this case that Worley was a government agent or that the government was implicated in any way in her allegedly perjurious testimony. See also *United States* v. *Agurs*, 427 U.S. 97, 111 (1976). Moreover, the Court in *Mesarosh* expressly stated that its decision did not pertain to a motion for a new trial under Fed. R. Crim. P. 33 (352 U.S. at 9, 12 n.7). Finally, the decision in *Mesarosh* involved a unique situation and is correctly viewed as being "sui generis." *United States* v. *Zane*, 507 F. 2d 346, 348 (2d Cir. 1974), cert. denied, 421 U.S. 910 (1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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